

MONTANA PUBLIC DEFENDER COMMISSION

Minutes

Yogo Inn

Lewistown, Montana

April 18, 2008

(Approved at the July 18, 2008 Commission Meeting)

Call to Order

The Montana Public Defender Commission meeting was called to order by Chairman Jim Taylor at 8:40 a.m.

Commissioners Present

Dan Donovan, Great Falls; Mike Sherwood, Missoula; Caroline Fleming, Miles City; Vic Miller, Harlem; Tara Veazey, Helena; Wendy Holton, Helena; and James Park Taylor, Missoula.

Commissioners Absent

Stephen Nardi, Kalispell; Jennifer Hensley, Butte; Gabriel Grant, Browning; William Snell, Billings

Interested Persons

Scott Crichton, American Civil Liberties Union of Montana (ACLU); Brent Doig, Office of Budget and Program Planning; Allen Beck, contract public defender in Lewistown; Douglas Day, Region 7 Deputy Public Defender

Approval of Minutes from the February 29, 2008 Meeting

Commissioner Miller moved to adopt the minutes as submitted. Commissioner Donovan seconded the motion. The motion carried.

Reports

Chief Public Defender Report

- *Public Defender Program Update*

Chief Public Defender Randi Hood informed the Commission that Matt Wald, currently managing Regions 10 and 11, has decided to return to private practice. Olivia Norlin will be the regional deputy in Region 10, and Garry Bunke will assume the duties in Region 11. Mr. Wald will assist with the transition and Chief Hood hopes that he will do some contract work in the Hardin area, where there is a significant need. Chief Hood expects to conduct a meeting with all regional deputy public defenders in Helena on May 16 to provide an update on operational issues and create an opportunity for open discussion.

Jon Moog has been hired as a rover based out of the Central Office to work cases in Regions 4 and 5 that were previously handled from the Boulder office. Mr. Moog will also act as the Office of the State Public Defender (OPD) administrative and personnel attorney. The files currently stored in the Boulder office will be moved to a secure facility in Butte. A file management function to handle files from around the state is a decision package in the proposed budget.

Chief Hood addressed several staffing issues ([exhibit 1](#)). Resources have been temporarily shifted to handle staff shortages in Billings and Helena. Additional resources have also been needed to work a potential death penalty case in Billings. One of the Polson attorneys will be going to Libby as a “remote” attorney; he will have an office but no support staff.

Performance appraisals are progressing well for both contract and FTE public defenders. The evaluation form will factor in some of the ABA’s Ten Principles of a Public Defense Delivery System. Chief Hood hopes to be close to finishing by mid-summer.

The issue of charging 25 cents per page for discovery in Helena has been resolved by Region 4 Deputy Public Defender Kristina Neal. Ms. Neal met with the county attorney and it was agreed that OPD will not be charged for discovery.

Commissioner Holton had a call from a public defender who expressed concerns about the mental health protocol and wished to remain anonymous. Chief Hood said that ongoing training regarding the protocol is needed and it will be a topic of discussion at the regional deputy meeting in May. Commissioner Fleming said that the Commission should not be dealing with anonymous complaints because they are unprofessional and destructive. She strongly urged referral to the appropriate complaint procedure in all cases. Commissioner Holton said that the person that contacted her feared retaliation from management. However, employees who are part of a collective bargaining unit are protected from retaliatory action and should contact their shop steward if they see it as an issue. Chief Hood also encouraged employees to discuss problems or concerns with their managing attorney or regional deputy.

- *Caseload/Workload Measurement*

The workload measurement tool ([exhibit 2](#)) that was discussed in detail at the last Commission meeting was implemented in all offices as of March 1. The attorneys’ response so far has been good. There will be four months of data to report at the next Commission meeting.

- *Labor-Management Discussion*

The pay addendum to the original collective bargaining agreement that contains a career pay ladder went to the attorney membership for ratification on April 9; they have two weeks to make a decision. If approved by the union, it will be subject to availability of funding. The support staff and investigator bargaining units meet again April 24. The list of issues has not yet been finalized for those units.

- *Financial Update*

Administrative Director Harry Freebourn presented the Fiscal Year 2008 Year-to-Date Financial Statement through March 31 ([exhibit 3](#)). The legislative audit of fiscal years 2007 and 2008 continues, with field visits of the regional offices expected to wrap up in early May. Lead auditor Jennifer Erdahl will address the Commission when the report is complete in October or November.

Mr. Freebourn reviewed exhibit 3 in detail. The budget is being monitored very closely, and some expenditures may be delayed until next fiscal year. He noted that the percentage of population figures have been updated. Commissioner Veazey expressed concern about the percentages in Region 10. Mr. Freebourn said that the figures are somewhat skewed for reasons that are being investigated. For example, Billings may have approximately 3,000

cases that haven't been closed, but it is unclear which years these cases relate to. When these numbers are corrected it will shift all of the percentages including those in Region 10.

In Region 2, the cost of chemical dependency evaluations is extremely high because they are being required by a local judge as a condition of bond in Missoula. In other regions, evaluations are conducted as a condition of sentencing and OPD is not responsible for payment. Commissioner Holton will check on case law prohibiting the bond condition, and Chief Hood will meet with Region 2 management to discuss if and how to approach the issue with the judge.

Mr. Freebourn circulated graphs showing the historical costs of mental health evaluations ([exhibit 4](#)) and contract attorney services ([exhibit 5](#)). He noted that costs for both services were expected to fall over time. Some offices are in transition from providing services by contractors to providing them by FTE. The mental health protocol is controlling costs via a fee schedule even though the intent wasn't necessarily to reduce costs, but to provide the most appropriate services for clients. So far the requirement that contractors bill within 45 days from the last day of the month of service seems to be working, but there still may be surprises as fiscal year end nears. Contract attorney services are currently averaging \$550,000 per month, down from \$650,000 per month last year.

Commissioner Donovan had several questions regarding contract costs. Mr. Freebourn provided the responses in italic.

1. What percentage of the total caseload is contracted out? *Last year's percentage was 65% FTE and 35% contract attorney. New figures will be available following the end of the fiscal year.*
2. How many contract cases are conflicts? *Unknown; will research.*
3. Can the hourly rate for felony cases be equated for contract attorneys and FTEs? *The average rate for FTE attorneys is \$71 per hour, but that is not specific to felonies only. The calculations on the true cost of contract attorneys done for the last legislative session came close to \$71 per hour also. A new calculation of how much Central Office overhead is allocated to contractors versus FTEs is needed and will result in updated rates.*
4. Can contract attorneys use OPD investigators? *Yes, and more OPD investigators are now on staff because managing personnel costs introduces more predictability than using contract services. The two chief investigators are also overseeing all of the investigative work more closely and working towards a "hub" system to provide services across the state.*

- **2011 Biennium Budget**

Mr. Freebourn spoke about the FY 2010-2011 Draft Budget ([exhibit 6](#)). He stated that the base budget for FY 2010 and 2011 is expected to be 192.50 FTE and \$19.2 million per year. The agency's FY 2008 expenditures will constitute the base budget less one-time appropriations. There is a request of \$500,000 per year fiscal year to support death penalty cases. Mr. Freebourn discussed each new budget item in detail. New items proposed include an additional 22.75 FTE and approximately \$1.9 million per year to support increased caseload. Some elements that might contribute to an increase in caseload are the poor economy, which may result in both an increase in crime and a greater number of people qualifying for services, and a potential budget request by the judiciary for up to eight new district judges in the next session. In addition, using FTE instead of contract attorneys in

specific locations will alleviate some of the risk of relying too heavily on individual contractors who may choose to end their relationship with OPD at any time. The Commission asked Mr. Freebourn to find out if the percentage of people living in poverty is expected to increase or decrease.

The Commission discussed the proposed increase in contract attorney rates at great length. Mr. Freebourn summarized the information he gathered regarding contractor rates nationwide (found in the Spangenberg report), the new federal rate of \$100 per hour, and discussions with OPD contractors. Compared to other states, Montana's fee structure is very simple administratively. Many states have some sort of cost cap and some pay different rates based on the type of case and whether or not the case goes to trial. The proposed rate of \$65 per hour seemed to be the mode based upon various assumptions made by staff about what other states pay. In conversations with contract attorneys, they suggested that they should receive a rate increase and get at least the same cost of living increases that state employees receive, and the proposed rate includes an inflationary increase for the second year of the biennium.

Commission members discussed the merits of various rates from \$65 to \$80 per hour and compared those rates to rates charged by civil attorneys and contract prosecutors. Commissioner Sherwood advocated strongly for a higher rate with the provision that the contractor have support staff and internet access so that OPD isn't paying attorney rates for secretarial work.

Public Comment

Allen Beck, contract attorney in Lewistown, said that he views the present system as a huge leap forward in terms of the quality of work clients receive. He considers his work as a public defender to be a public service that he does instead of pro bono work because public defenders' earnings will never be commensurate with the amount of work they do. He supports Commissioner Sherwood's suggestion regarding contractor rates.

Reports (continued)

- *2011 Biennium Budget (continued)*

Mr. Freebourn asked that the Commission approve a placeholder in the budget for a rate increase for contract attorneys. He is not asking the Commission to set a new rate at this time, just to identify a figure to include in the budget proposal going to the Governor's office. Chairman Taylor said that is important that these funds remain restricted for the purpose of funding the contractor rate increase only. The Commission asked Mr. Beck what other benefits they might be able to provide to contract attorneys to supplement the hourly rate. Mr. Beck suggested that an automated billing service would be helpful. He appreciates the training opportunities and the appellate support he receives as well as assistance from the regional office, including secretarial and investigative services, and the Lexis access.

Chairman Taylor moved to use \$70 per hour as the placeholder for an increase in contract attorney rates. Commissioner Holton seconded. The motion failed with three in favor, two opposed and two abstentions.

After further discussion, Commissioner Fleming moved to use \$75 per hour as the placeholder figure. Commissioner Veazey seconded. There was clarification that the inflationary adjustment for the second year of the biennium would still be included; only the base figure would be changed from \$65 to \$75 per hour. The motion carried unanimously.

Chairman Taylor asked that the budget items be amended to include an external assessment of the system. There is an enormous amount of national interest in Montana's system, and he thinks it likely that federal funds might be available to do the work, but would like to see a placeholder in the budget. Commissioner Fleming moved to include \$10,000 in the budget request to fund an independent evaluation of the Montana public defender system. Commissioner Donovan seconded. The motion carried.

Chief Hood explained the attorney career pay ladder in detail. It has been submitted to the union for approval. The unfunded amounts by fiscal year are projected based on current staffing. Brent Doig, Office of Budget and Program Planning, noted that career pay ladders are an issue in many agencies. However, each agency is given a target and all new budget items are expected to be below that (line 2, "EPP above base") and are subject to adjustment by the Governor's office once the budget is submitted.

The total new budget items including additions and changes by the Commission is about 25.00 FTE and \$4.6 to \$4.9 million per fiscal year.

- *Client Reimbursements*

Collection of client reimbursements is expected to be both a legislative and an audit issue. Roughly 90% of courts aren't assessing fees and weren't doing so prior to inception of the statewide system. However, in Missoula County, courts stopped doing assessments because they must prove the client's ability to pay. Mr. Freebourn gave examples of collections from various counties in Montana. He also spoke about the assessment practices in various states around the country. OPD collections generate a small amount of income for the intensive administrative effort required to document the receivables and collections. OPD expects to collect about \$35,000 during FY 2007 and FY 2008 while assessments are expected to be about \$70,000 during the same period.

Chief Hood feels strongly that the agency should not ask indigent clients to pay the cost of services to which they are entitled. Scott Crichton, Executive Director of the American Civil Liberties Union of Montana, said that some legislators think that OPD works for the taxpayer, not for the client, and that OPD should be prepared for some ideological issues relating to this during the next session.

- *Legislative Items ([exhibit 7](#))*

Training Coordinator Eric Olson and several OPD staff members including mental health consultant Dr. Laura Wendlandt attended the recent meeting of the Law and Justice Interim Committee. Possible mental health and juvenile justice legislation were on the agenda. Mr. Olson was particularly interested in avoiding legislative changes that would limit OPD's ability to advocate for people subject to involuntary commitment. A bill to abolish the practice of shackling people being transported for mental health evaluations may be introduced in the next session.

Chief Hood plans to resubmit the electronic recording bill. Any other proposed legislation must be finalized at the July Commission meeting and approved by the Commission.

Mr. Freebourn and Chief Hood met with the Governor's legal counsel regarding the document titled "Guidance for Members Appointed to Boards and Commissions within the

Executive Branch of Montana State Government.” All Commission members should be familiar with the guidelines contained in the document prior to the start of the legislative session. Mr. Freebourn said that neither the agency nor the Commission are free to testify on any bill of choice, but must consult with the Governor’s office before testifying on behalf of the agency.

- *IT Update*

Mr. Freebourn presented the IT Update ([exhibit 8](#)) and the Case Information Management Project report ([exhibit 9](#)). John Coulthard replaces Theron Wilson in the Central Office, bringing a wealth of experience in SABHRS from his previous position at ITSD. Information Technology Manager Teri (Heiland) Kelly is gathering a team to define the business requirements of the brief bank. They plan to meet in May. The JustWare customer service function has been separated from the IT department. A dedicated full-time staff person will work the help desk and provide ongoing training.

Public Comment

Mr. Crichton said that data is a huge dilemma for the Department of Corrections and the jails and that OPD data specificity might help with budget issues during the upcoming session. He would welcome the opportunity to work with OPD on treatment for non-violent drug offenders, even though the Department of Corrections has not identified it as a problem. Mr. Crichton thanked OPD for having staff at the last meeting of the Law and Justice Interim Committee to talk about the involuntary commitment process.

Reports (continued)

- *Training Coordinator Update ([exhibit 10](#))*

Mr. Olson is working on the training schedule for FY 2009, to be posted on the website soon. A mandatory training for lower court practitioners is scheduled for early July in Helena. Ethics will be part of all of the large programs next year, including the annual meeting to be held in Lewistown in October. Chief Hood said that all of the training sessions have received rave reviews. Mr. Olson continues to work on developing library materials.

- *Contract Manager Report and Contractor Rate Discussion*

Mr. Freebourn presented the anticipated cost for implementing a graduated stipend as well as two other possibilities (actual costs or an increase to the hourly rate) ([exhibit 11](#)). He asked the Commission if there were additional scenarios to consider. Chairman Taylor suggested spending the available funds on additional services for contractors instead of a stipend, and asked that suggestions be solicited in the newsletter. Mr. Beck asked the Commission to consider providing insurance or representation before the Office of Disciplinary Counsel for contract attorneys. Implementation of the brief bank will be another significant benefit for contractors.

- *Appellate Defender Program Report ([exhibit 12](#))*

Chief Hood reported that most of the contract cases are currently waiting for an opinion. There has been a sudden increase in cases requiring Anders briefs, which take a significant amount of time. A substantial sum has been spent on transcripts for clients who don’t want to appeal. Chief Appellate Defender Jim Wheelis will do some training with attorneys in those locations on how to discuss appeals with their clients to avoid incurring unnecessary costs. The Commission briefly discussed offering public defenders a cash incentive to close

cases, but decided that it was inappropriate and might lead to an unacceptable increase in plea bargains.

- *Recording Jail Phone Calls*

The Montana Association of Counties is currently surveying all 56 counties on their procedures relating to privileged calls, and the Montana Department of Corrections is seeking additional information about the call data that is saved to disk. This topic will be on the July agenda.

General Discussion

- *Region 3 (Great Falls) Issues*

Chairman Taylor said that the Commission would discuss the Region 3 issues only as they relate to the Commission's policy role since hiring decisions are by statute the purview of the Chief Public Defender.

Cascade County Attorney Brant Light has two issues relating to the OPD Region 3 office and Department A of the 8th Judicial District. The first is an imputed conflict of interest under rule 1.10 of the Rules of Professional Conduct. Chairman Taylor stated that rule 1.10 no longer applies to government employees following the Montana Supreme Court's 2004 amendment to the model rules. The second issue, related to disqualification of judges under 3-1-803 MCA, is more complicated. The Standards define each region as a firm, so the application of the statute is at issue, and it is the same whether the employee is an assistant or a regional deputy public defender.

The Commission engaged in a lengthy discussion of various concerns, including the definition of a firm and the "appearance of impropriety." OPD has implemented a firewall procedure in Region 3 to remove the regional deputy public defender and the judge from any potential conflict of interest or appearance of impropriety and this procedure will be formalized as a written policy. Commissioner Donovan asked whether the regional deputy had supervisory authority over the attorneys practicing in the judge's court. Chief Hood said that the managing attorney in each office is responsible for day to day supervision and evaluation of staff attorneys, and the contract manager assesses the proficiency of contract attorneys.

It is possible that Cascade County will seek an opinion from the attorney general or file a formal complaint to resolve the issue. The Commission agreed that it is up to Mr. Light to test his interpretation of the statute. They are confident that the firewall procedure is adequate and that ethical violations are not an issue.

- *Commission Operating Procedures*

Chairman Taylor has been asked by the Governor's office to accept reappointment to the Commission despite his upcoming absence. He asked the Commission to amend their operating procedures to allow him to participate in Commission business from China by

1. allowing attendance at Commission meetings by videoconference; and
2. allowing proxy votes at up to two meetings per year.

Chairman Taylor moved to amend the operating procedures as described. Commissioner Sherwood seconded. Commission Miller questioned whether proxy votes are allowed by statute, and asked that the items be split into two separate motions. Chairman Taylor

amended his motion to include only attendance by videoconference. Commissioner Veazey seconded. The motion carried. The proxy issue will be investigated for future discussion.

- *Report on Indigent Defense Conference*

Commissioner Sherwood said there is a great benefit to continuing to attend the national conference; there were 115 participants this year, the most ever. He said that Montana is leading the way and has a responsibility to help those that are following. Commissioner Fleming said that Montana has a great team.

- *Self-Evaluation—Compliance with ABA's Ten Principles of a Public Defender Delivery System ([exhibit 13](#))*

Commissioner Donovan said that a constant self-evaluation process is needed to monitor compliance with the Ten Principles and to identify what is and isn't working. Chief Hood has incorporated principles 4-10 in the employee self-evaluation tool. Commissioner Donovan invited all Commission members to go through the evaluation process as he did, and Chairman Taylor agreed that it should be discussed again in July.

Public Comment—Contract Attorney

Mr. Beck thanked the Commission for coming to Lewistown and the Commission said that they very much appreciated Mr. Beck's contributions to the meeting. *Everyone* thanked Regional Deputy Public Defender Douglas Day and his wife for hot-from-the-oven chocolate chip cookies.

Mr. Beck has a concern about civil rights violations in jails, and was encouraged to refer those complaints to the ACLU. Chairman Veazey would like to have time on the next agenda to discuss this issue as well as racial disparity.

Old Business/New Business (Action Items)

Commissioner Veazey moved to approve the proposed budget as amended. Commissioner Miller seconded. Motion carried.

Chairman Taylor requested written input from the Central Office, the Labor Management Committee, contract attorneys, the ACLU, the Law and Justice Interim Committee and other stakeholders regarding what should be included as part of the independent evaluation process.

The next meeting is scheduled for July 18. Chairman Taylor proposed holding the meeting in Polson, with an additional half-day on July 17 for committee meetings.

Adjourn

The meeting adjourned at 3:15 p.m.

Exhibits 1 – 13 have been posted with these minutes to the Office of the State Public Defender website at: <http://www.publicdefender.mt.gov/>.